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No. 96-2021

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

Dickie Bouye and William Bouye,

Petitioners,

vs.

State of South Carolina,

Respondent.

On Petition for Writ of Certiorari
To the South Carolina Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' QUESTION PRESENTED

Whether Section 16-15-365 of the South Carolina Code, which prohibits "lewd and lascivious conduct" is unconstitutionally overbroad where "lewd and lascivious" is deemed anything which causes sexual arousal and there are no protections for expression protected by the First Amendment of the United States Constitution?

RESPONDENT'S COUNTER-QUESTION PRESENTED

Should Certiorari be denied because the specific constitutional challenge raised by Petitioners is merged with issues which were not preserved in the lower court and because Petitioners have ignored the limiting construction given the statute under challenge which construction effectively renders moot Petitioners' claims that the statute is overbroad as outlawing all nudity which causes sexual arousal?

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Respondent, State of South Carolina, prays that the Petition to review the judgment of the South Carolina Supreme Court in the above-styled case be denied and dismissed.

CITATION TO OPINION BELOW

The February 1997 opinion of the South Carolina Supreme Court is reported

at ___ S.C. ___, 484 S.E.2d 461 (1997), and is reproduced in the Petition at Appendix A. The Order of the South Carolina Supreme Court denying rehearing is dated March 20, 1997 and is unreported. The Order is reproduced as Appendix B to the Petition.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 18, 1997, and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following:

(1) Fourteenth Amendment to the United States Constitution which provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) The First Amendment to the United States Constitution which provides in relevant part:

> Congress shall make no law...abridging the freedom of speech...

(3) South Carolina Code Ann. § 16-15-365 which provides

> Any person who wilfully and knowingly exposes the private parts of his person in a lewd and lascivious manner and in the presence of any other person, or aids or abets any such act, or who procures another to perform such act, or any person, who as owner, manager, lessee, director, promotor, or agent, or in any other capacity knowingly

> hires, leases or permits the land, building, or premises of which he is owner, lessee, or tenant, or over which he has control, to be used for purposes of any such act, is guilty of a misdemeanor...

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

I. Procedural History

Petitioners, as owners or managers, were indicted at the July 1995 term of the Court of General Sessions for Spartanburg County, South Carolina, for knowingly permitting the use of their premises for the knowing exposure of private parts by females working there in a lewd and lascivious manner and in the presence of others. Petitioners proceeded to trial October 16-18, 1995, before the Honorable J. Derham Cole, Judge, and a jury. Dickie Bouye was found guilty of two of the three counts charged and William Bouye was

acquitted of one charge and convicted of a second.

Petitioners served and filed notice of intent to appeal and following full briefing and oral argument, the South Carolina Supreme Court affirmed the convictions and sentences. State v. Bouye, ___ S.C. ___, 484 S.E.2d 461 (1997). Petitioners moved before the South Carolina Supreme Court for Rehearing which was denied on March 20, 1997.

II. Statement of Relevant Facts

For the purpose of this Brief in Opposition, Respondent incorporates herein the recitation of relevant facts from the opinion below.

HOW THE QUESTION WAS RAISED BELOW

At trial and prior to the taking of testimony, Petitioners moved to dismiss the charges on the ground that South Carolina Code Ann. § 16-15-365, the statute with which they were charged

conflicted with Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991) and Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994) on the ground that the statute prohibits nudity in violation of the First Amendment. Petitioners argued that the terms "lewd" and "lascivious" are not defined and that § 16-15-365 is overbroad. Petitioners asserted that the statute could be applied to sexual relations between husband and wife in the privacy of the home. (R. p. 6, line 18 - p. 12, line 14; p. 15, line 22 - p. 16, line 12; p. 17, line 10; p. 23, line 15 - p. 24, line 20). Petitioners conceded that obscene dancing or lewd and lascivious dancing is not protected by the First Amendment but contended that the statute was not drawn narrowly enough. (R. p. 60, line 1 - p. 1, line 11). When the State rested its case and at the close of evidence,

Petitioners renewed the motion to dismiss on the ground that the statute is facially invalid as overbroad in that it had the effect of deterring protected speech. Petitioners argued that the statute prohibited any and all nudity; private and public. (R. p. 145, line 23 - p. 149, line 2; p. 233, lines 2-25). The trial court denied Petitioners' motion to dismiss, finding that the cases upon which Petitioners relied were distinguishable. (R. p. 234, line 15 - p. 235, line 2). Petitioners indicated they might also challenge the statute on the ground of vagueness depending on the jury charge the trial court would later give. (R. p. 235, lines 9-17). The trial court charged the jury as follows:

> Lewd means vulgar, indecent, tending to arouse sexual desire or imagination and lacking moral discipline or sexual restraint. Lascivious is defined

> as lustful or tending to incite lust or tending to deprave the morals in respect to sexual relations.

(R. p. 248, lines 8-12. See also p. 236, lines 8-18. See also R. p. 255, lines 13-17). Petitioners did not object to this jury charge regarding the terms "lewd" and "lascivious". Petitioners never challenged the statute on the ground of vagueness. (R. p. 252, line 10 - p. 258, line 25).

Petitioners, on appeal to the South Carolina Supreme Court, asserted that § 16-15-365 of the South Carolina Code of Laws, was unconstitutionally overbroad on its face and as applied in their case so as to draw within its ambit speech and expression which is constitutionally protected, including all topless dancing. (See Final Brief of Appellants).

The South Carolina Supreme Court in its February 18, 1997, opinion first noted

out that Petitioners conceded during argument that the conduct of the topless dancers in question in their case was obscene and not constitutionally protected. The Supreme Court thereafter addressed Petitioner's claim that the statute is facially overbroad because it can be applied to other constitutionally protected conduct not involved in Petitioners' case. The South Carolina Supreme Court opined that the statute prohibited conduct and not speech and construed the legislative intent from language of the statute and related statutes as well as from prior judicial decisions as a prohibition of obscenity. The court noted that obscenity is specifically statutorily defined and that the definition as codified applies to § 16-15-365. See footnote 5, State v. Bouye, supra. The court also, through statutory construction, limited the reach

of § 16-15-365 to public conduct. The court, in a footnote, summarily rejected Petitioners' argument that the statute is unconstitutional as applied to them on Petitioners claim that the record contained no evidence they were aware that the offensive conduct was being performed. The Court concluded that Petitioners had no constitutionally protected right to procure or knowingly permit others to perform illegal conduct on their premises and, alternatively, that there was sufficient evidence in the record to support Petitioner's conviction. State v. Bouye, supra.

REASONS FOR DENYING THE WRIT

Should Certiorari be denied because the specific constitutional challenge raised by Petitioners is merged with issues which were not preserved in the lower court and because Petitioners have ignored the limiting construction given the statute under challenge which construction effectively renders moot Petitioners' claims that the statute is overbroad as outlawing all nudity which causes sexual arousal?

Petitioners claim that § 16-15-365 read verbatim and giving common dictionary definitions to the terms "lewd" and "lascivious" is unconstitutionally vague; is unconstitutionally overbroad in that it outlaws anything which causes sexual arousal and operates to ban any conduct deemed lewd and lascivious regardless of literary, artistic or overriding constitutional protections; and conflicts with similar cases decided by state and federal courts. Respondent asserts that the petition should be declined because the specific constitutional challenge raised in the Petition for Certiorari is merged with issues not preserved in the lower court and because it is clear from a reading of the argument in the Petition that Petitioners have misapprehended the opinion below. Petitioners fail to recognize the limiting construction provided the statute in question by the

state court and which effectively moots Petitioners' claims that the statute outlaws all nudity in the state which causes sexual arousal.

Specifically, to the extent that Petitioners now argue that the statute in question is unconstitutionally vague and to the extent Petitioners offer specific common dictionary definitions of the terms "lewd" and "lascivious" as contributing to the alleged constitutional infirmity, then this appeal contains a jurisdictional defect. Claims concerning vagueness and the dictionary definitions offered by Petitioners are not properly before this Court. Neither claim was preserved at trial by way of objection or motion. In fact, the definitions of lewd and lascivious which Petitioners now characterize as common dictionary definitions were those charged to Petitioners' jury and to which Petitioners

acceded at trial. Under state procedural law, Petitioners are absolutely precluded from arguing on appeal to the South Carolina Supreme Court a matter which was not preserved by way of contemporaneous objection or motion at trial. State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995); State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989). Petitioners made no reference on appeal in the South Carolina Supreme Court to these matters they now raise. Petitioners' failure to preserve these matters in the lower court and Petitioners' manner of merging or jumbling these unpreserved arguments with the issue which was properly preserved below should lead this Court to decline consideration of the challenges as presented to this Court were not made to, fully considered by or fully litigated in the state trial and appellate courts. Therefore, Respondent submits that certiorari should

be denied for the initial reason that Petitioners' manner of presenting his argument to this Court has deprived this Court of jurisdiction by arguing together both preserved and unpreserved issues. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed 2d 527 (1988); Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed.2d 517 (1952). The better approach would be to allow the state courts the opportunity to reach a decision regarding the constitutionality of the statute after first having been fully presented with and ruling on all of the challenges. Other cases are likely to follow this case of first impression for the South Carolina courts regarding § 16-15-365 and may result in a more thorough preservation and delineation of the issue.

Alternatively, as to the merits of Petitioners' facial overbreadth argument

which was preserved below, Respondent submits that Petitioners completely ignore the South Carolina Supreme Court decision in this case which reviewed the history and language of § 16-15-365 and other statutes in the article, reviewed prior judicial decisions and employed rules of statutory construction to authoritatively construe the terms "lewd" and "lascivious" to mean obscene. The state Supreme Court also construed § 16-15-365 as limited in application to knowing, public conduct; and defined "obscene" for purposes of Section 16-15-365 in the same manner as this Court defined the term Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), and which was codified by the South Carolina legislature for statutes appearing in the article in which 16-15-365 falls. The terms "lewd" and "lascivious" were not defined by the legislature or by the South Carolina

Supreme Court opinion in this case in the manner Petitioners suggest. Quite the contrary, lewd and lascivious was equated with obscene as authoritatively and specifically defined in this State in accordance with the standard or test enunciated in Miller. The statute in question has been construed by the South Carolina Supreme Court as prohibiting the obscene, knowing, public display of private parts. This Court has repeatedly held that the protection of the First Amendment does not extend to obscene speech. Miller v. California, supra; See Reno v. ACLU, ___ U.S. ___, ___ L.Ed.2d ___, 117 S.Ct. 2329 (1997); Sable Communications v. FCC, 492 U.S. 115, 106 L.Ed.2d 93, 109 S.Ct. 2829 (1989); Paris Adult Theater I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 93, 109 S.Ct. 2628 (1973). Therefore, the reach of the statute in question cannot be overbroad as sweeping

within its ambit speech which is constitutionally protected. Contrary to Petitioners' claim, the statute, as interpreted by the state Supreme Court is consistent with this decisions of this Court and with similar cases decided by other state and federal courts. Petitioners' assertion that the statute is overbroad in that it operates to ban any and all nudity is simply untrue and unsupported by a reading of the statute in question and the South Carolina opinion construing it. The statute, as construed, proscribes the knowing, obscene, public display of private parts. There is no total ban of public nudity or nude dancing as Petitioners claim.

Petitioners offer neither real nor substantial infringements of First Amendment protected speech in light of the construction or interpretation provided by the South Carolina Supreme Court. The

statute, as construed, sufficiently defines that which is prohibited and is limited in application to knowing, public exposure of private parts in a manner which taken as a whole appeals to the prurient interest in sex; portrays in a patently offensive way, sexual conduct specifically defined by State law; taken as a whole lacks serious literary, artistic, political, or scientific value; and is not otherwise protected by the Constitutions of the United States or of South Carolina. See South Carolina Code Ann. § 16-15-305 which provides the definition of "obscene" for the article in which 16-15-365 falls. Contrary to Petitioners' argument in the Petition, the statute as construed would not apply to private sexual relations or to any landlord leasing or renting property to individuals who engage in private sexual relations because public conduct is

required along with scienter on the part of the landlord. Contrary to Petitioners' argument, the statute, as construed, would not outlaw nude posing for pictures or art, the display of art, or theatrical performances, television programs, videotapes or non-live productions which contain nudity unless serious literary, artistic, political or scientific value was absent and the other prongs of the obscenity standard were met rendering the performance or production obscene and then not subject to First Amendment protection.

Further, in light of the construction or interpretation provided by the South Carolina Supreme Court, the statute in question and the decision construing it are in accord with the decisions of this Court as well as state and federal courts which Petitioners attempt to offer as conflicting. The decisions offered by Petitioners as conflicting do not involve

obscenity and are not applicable. Nevertheless, even assuming arguendo this Court's decision in Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991) and the Sixth Circuit Court of Appeals decision in Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994) were applicable, this statute does not conflict with either. The statute and opinion construing it are consistent with this Court's decision in Barnes. The statute in question, just as in Barnes furthers the interest of South Carolina in protecting societal order and morality as well as protection from secondary effects of adult establishments. Paris Adult Theater I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 446, 93 S.Ct. 2628 (1973). The statute in question, as construed by the State Supreme Court, reflects the moral disapproval in this State of individuals

publicly exposing private body parts in an obscene manner. As in Indiana, South Carolina does not record legislative history but the purpose of protecting societal order and morality as well as combating the secondary effects of adult entertainment is clear from the text of the statute and legislative history regulating morality and decency in this State. This statute is consistent with other laws enacted in this State and in other states which proscribe public indecency and obscenity, See South Carolina Code § 16-15-10, et seq. See particularly, 16-15-90 (Prostitution, lewdness); 16-15-130 (Indecent exposure); 16-15-140 (Committing/attempting lewd act upon child); 16-15-250 (Communicating obscene message to women). This Court has recognized that the police power of the states allows for the provision of public health, safety and morals and is an

appropriate basis for legislation such as is involved here. As in Barnes, the interest served here is not the suppression of free expression but the public obscene conduct whether or not expressive activity is involved. Erotic messages or performances may be accomplished so long as the performance does not rise to the level of obscene conduct; a restriction which is no greater than that needed to meet the state's interest in protecting order and morality. As this Court noted in Barnes, the restriction "...does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." 501 U.S. 571. The subject of this statute is the obscene exposure whether or not expressive conduct is involved and not, as Petitioners claim, nudity per se. This is a general law regulating conduct.

Petitioners also urge conflict with a number of other cases as a ground forgranting certiorari. All of the cases upon which Petitioners rely are readily distinguishable as not proscribing obscene public conduct but something short of that and are also distinguishable because the statutes or ordinances involved were not given limiting construction to preserve the constitutionality as has the statute in question here. In fact, the state court cases Petitioners urge are in conflict with this law support the judicial limitation given by the South Carolina Supreme Court in this case in an effort to preserves the constitutionality of the statute in question. Contrary to Petitioners' claims, and given the limited application of the overbreadth doctrine where a limiting construction has been employed and based on the fact that the overbreadth doctrine has been invoked

regarding a statute which addresses conduct as opposed to speech, § 16-15-365 should not be deemed substantially overbroad. See Broadrick v. Oklahoma, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). Nevertheless, any overbreadth which might exist should be cured through case-by-case analysis of fact specific situations to which the prohibition may not apply. Id.; New York v Ferber, 458 U.S. 747, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982).

This is not a case in which this Court's discretionary review should be invoked.

CONCLUSION

For all of the foregoing reasons, Respondent submits that this Court should decline review of this case.

Respectfully submitted,

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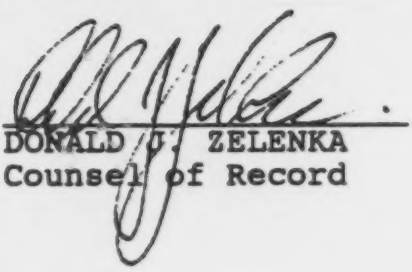
By: 
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